FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT AT
CENTRAL LONDON SITTING AT 10
ALFRED PLACE, LONDON WC1E 7LR

Tribunal Reference	**:**	**LON/00BK/LSC/2020/0375** **LON/00BK/LSC/2021/0023**
Court Claim No	**:**	**G84YX791**
HMCTS Code	**:**	**CVP Remote**
Property	**:**	**Flat 25 Dudley Court, Upper Berkeley Street, London W1H 5QA**
Applicant Claimant	**:**	**Intercontinental Developments Limited**
Representative	**:**	**Mr Joel Semakula of Counsel, instructed by Bishop & Sewell LLP**
Respondent	**:**	**Antonio Maria Franzi**
Representative	**:**	**no attendance**
Type of Application	**:**	**Determination of costs and interest following a hearing on 7 June 2021**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mrs A Flynn MA MRICS**
In the County Court	**:**	**Tribunal Judge Dutton** **Mrs A Flynn MA MRICS as Assessor**
Date of Hearing	**:**	**17 January 2022**
Date of Decision	**:**	**18 January 2022**

DECISION

COVID-19 PANDEMIC: DESCRIPTION OF HEARING

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was CVP Video. A face-to-face hearing was not held because it was not practicable, and no-one requested same and further that issues could be determined in a remote hearing.

The documents that we will refer to were in a bundle of some 25 pages which have been noted by us during the course of the hearing. The order is as described at the end of these reasons.

DECISION

1. **The tribunal determines that the costs payable by the respondent, following a summary assessment is £30,553.80 for the reasons set out below. Such sum is to be paid by 10 March 2022.**

2. **The tribunal determines that the interest payable is the sum of £400.00 again payable by 10 March 2022 for the reasons set out below**

Background

1. On 9 July 2021, subsequently amended on 17 January 2022 we found that the respondent was indebted to the applicants in the sum of £8,266.45 (the Decision). The question of the costs associated with the application and interest accruing on the sum found payable were adjourned to a later date. Directions were included in the Decision and provided for a paper determination. Subsequently a request for a hearing was made and the matter originally listed for 25 November 2021. However, on 15 November 2021, solicitors acting for Mr Franzi sought an adjournment because of problems following an assault. He indicated he would not be available until the new year.

2. The solicitors for the applicant consented to such an adjournment and the matter was relisted for 17 January 2022. However, on 12 January 2022 the solicitors acting for Mr Franzi said they were coming off the record.

3. Subsequently, on 13 January 2022 Mr Franzi sought a postponement of the hearing, both it would seem because of his financial situation and health issues. On 14 January 2022 he wrote again saying he had a fever and cough, and was gathering medical evidence to support his

application to postpone. He told us that he would not be attending. On the morning of the hearing he contacted the tribunal to confirm he would not be attending but that he was seeking medical support and new solicitors.

4. The applications for adjournment were opposed by the applicants and in support we were provided with the case report in the matter of Financial Conduct Authority v Avacade Limited and others [2020] EWHC 26 (Ch) 2020 WL 00281683.

5. Mr Semakula, counsel for the applicants, highlighted the elements needed to be established by the respondent to support an application for a postponement on the grounds of health as set out in the FCA decision at paragraphs 54 onwards.

6. In this case we have no medical evidence to support the respondent' s request for postponement. Further the solicitors then acting for the respondent had lodged a response to the applicant's statement of case setting out the respondent's position on this application. We were told that the solicitor having the conduct of the case would be absent for some time from the end of January.

7. The problems from which it is said the respondent suffers have not been raised before and very late in the day. Given that his solicitors have already filed a response there was little that his attendance would add as following consideration of the written submissions there would need to be a summary assessment of the costs, which we undertook. In the circumstances we declined to adjourn the matter.

Hearing

8. We were provided with a Statement concerning the applicant's entitlement to recover costs which also sought to explain an error on the final judgment figure and set out the interest claimed. On the error we were provided with a figure for inclusion in the Decision which proved to be incorrect. The error is in the respondent's favour and we there agree to amend the Decision and the judgment to reflect the new figure of £8,266.45.

9. On the question of interest, the applicant relies on clause 3.01.2 of the lease under which the respondent holds his interest. This provides that if a payment of rents or any part thereof are in arrears for fourteen days then interest becomes payable at the rate of 2% above the Bank Minimum Lending rate. This does depend on a demand for the rents having been made, which clearly have been in this case.

10. The respondent's solicitors sought to suggest that the demand had to be for interest, but we cannot agree with that interpretation of the lease. The interest flows from the respondent's failure to settle the demand and was pleaded in the Particulars of Claim.

11. The applicants' solicitors have calculated the interest from 14 August 2018 to the 27 July 2021 in the sum of £416.98, with a daily rate of £0.48.The calculation appears to have been dealt with by use of a computer programme.

12. We then turned to the question of costs. Mr Semakula relied on clause 3.16 of the lease. This said as follows:
To keep the Landlords fully and effectively indemnified from and against all actions proceedings claims demands liabilities costs charges and expenses howsoever arising which may be brought by any person against them or be incurred by them in consequence of any of the following matters or things
(a) The use of the Premises
(b) Any breach by the Tenant of any covenant or stipulation contained.

13. In addition, the applicant was entitled to recover the costs as a service charge by reason of the Third Schedule Part II to the lease at paragraph D(10). This relates to any sums paid or incurred by the Landlords or the managing agents in respect of *"All such acts matters and things as may be in the Landlords' or Managing Agents' discretion be necessary or advisable for the proper maintenance security or administration of the Building or for good estate management or for the performance of their obligation and exercise of their rights under this Underlease including the payment of all fees and expenses reasonably required in connection with the management of the Building to any Managing or other Agents Surveyors Accountants Solicitors or other professional advisors"*

14. This it was said enabled the costs of these proceedings to be recovered as a service charge as well as under clause 3.16.

15. Prior to the hearing we had referred the case of Kensquare Ltd v Boakeye [2021] EWCA Civ 1725 to the parties. Mr Semakula sought to differentiate this case from Kensquare in that there was specific mention of solicitors in clause D(10) in the Third Schedule Part II of the lease, which was lacking in the lease held by Mrs Boakeye (see para 54 of the judgment in that case).

16. On the question of the quantum of costs we were provided with two costs schedules in form N260. One in the sum, of £29,253.80 for the costs of the proceedings both before the Court and this Tribunal and the other ion the sum of £11,484.60 for dealing with this costs application. A total of £40,738.40 in respect of a debt of not much over £8,000.

17. Mr Semakula argued that costs should be awarded on a full indemnity basis and that proportionality played no part, this being a contractual debt. He did agree that reasonableness did play a part in our assessment. There was no application under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the

Rules) although it was suggested by the respondent that the applicant sought costs under this provision. We were reminded that this case had been running for some time. Indeed, the letter before action is dated 18 December 2019.

18. On the level of costs, we heard briefly from Mrs Rao of instructing solicitors Bishop & Sewell LLP. She had been involved with the case from the outset. We did query the amount of time spent on attendances with the client and were told that there had been communication with both the landlord, Intercontinental Developments and the managing agents HML, but she did not think this had caused duplication. We also queried the costs incurred in communicating with the respondent, which were in excess of 6.5 hours and on others, which we told was Counsel and the Court or tribunal.

19. Another area we sought clarification upon was the time spent under the schedule, in particular the preparation of briefs, both for the CMC and the hearing, which appeared to be three hours in each case, which we thought excessive. It was explained that the CMC brief contained the information relating to the case and taken time to prepare. In addition, the time spent in relation to attendances at the hearing and the CMC were queried.

20. In so far as the legal fees for the costs claim are concerned again, we queried the time spent with the client and on the respondent. We were told that's time had been spent investigating an anomaly in the judgment figure and calculating the interest. We also asked why Counsel's fees for the cost hearing where higher than the brief fee for the full hearing. In all cases we noted the responses given.

21. In addition to the above there was a claim of £402 for the fees of HML, which appeared to be an arrears management fee and costs of instructing solicitors, which it is said are either payable by reason of clause 3.16, or as a variable administration charge under schedule 11 of the 2002 Act.

22. The respondent had filed a response to the applicants claim for entitlement to costs. This was dated 13 September 2021. We have already referred to the respondent's argument on interest. The response then turned to the terms of the lease. Reference is made to clause3.14 which enables the Landlord to recover costs associated with forfeiture proceedings, although this was not in fact the main plank of the applicant's submission. As a matter of comment, we are somewhat doubtful that the claim could proceed under this head as neither the letter before action, nor the particulars of claim mention forfeiture, but it was not pursued before us. What is noted is that the response does not address the provisions of clause 3.16 but appears to conflate them with clause 4.01. What the response does say is that *"the majority of the contractual terms the applicant relies on to seek costs are not relevant as explained above"*.

23. Reference is made to rule 13 of the Rules but there is no application under that provision. The submission then goes on to explain why the respondent challenged the service charge costs.

Findings

24. We accept that in deciding contractual costs the question of proportionality is not relevant. However, reasonableness is. We accept Mr Semakula's argument that the costs of these proceedings, both before the Court and this tribunal are recoverable under the provisions of clause 3.16 and the Third Schedule Part II paragraph D(10), both of which we have set out above. Clause 3.16 is relevant as clearly the respondent has been in breach of his covenant to pay the rents as provided for in clause 3.01.1 of the lease. Paragraph D(10) specifically refer to solicitors costs, which in our finding would include Counsel's fees.

25. The respondent makes no challenge to the quantum of the costs, concentrating instead on the applicant's entitlement. There is little in the way of response to the entitlement of the applicant under clause 3.16. The points raised in respect of Rule 13 costs is not relevant. The reasons behind the challenge were addressed in our decision and taken into account at that time.

26. We have rejected the respondent's argument on the question of interest (see para 10). The sum claimed is, for reasons not wholly clear to 27 July 2021. Mr Semakula asked us to run interest forward to the date of the costs hearing and to provide for ongoing interest until payment. It seems to us that this is a recipe for more litigation. We have a discretion on interest. The applicant seeks interest at 2%, when it could, under the terms of the lease, be slightly higher as reference is 2% above the Bank Minimum Lending Rate. The difference would be minimal. We consider an appropriate sum would be £400, to reflect the interest to date of our judgment in July 2021, with no further accrual.

27. On the question of costs, we do not consider the hourly rate used by the applicant's solicitors to be unreasonable, nor the standard of fee earner, although the involvement of Ms Bright was perhaps unnecessary given the competence of Mrs Rao.

28. We propose to take a broad-brush approach to the assessment of the costs. We do think that the times spent both on attendances on the applicant, including the need to liaise with two parties, the Landlord and the managing agent, and on the respondent are high. In addition, the costs on such items such as the attendance at the CMC and the preparation of the brief for same are too high. No attendance by solicitors at the CMC would be required with Counsel present and three hours, including two hours of Ms Bright's time to brief counsel for a CMC, when much of the paperwork was still to be produced is

excessive. It is usual for costs of attendance on the Court or tribunal to be absorbed in the hourly rate.

29. Further the costs in relation to the claim for costs seems unreasonably high. It is nearly 40% of the costs of running the whole case. Again, the attendance on the client seems excessive, over 9 hours and two members of staff at the hearing which lasted only some 2 hours is also excessive. Counsel's fee for the costs hearing is £500 more than the brief fee for the full hearing. The fee for calculating the interest seems high as it looks as though this was dealt with by way of computer programme.

30. Taking these matters into account we consider that it is reasonable to reduce the overall fee claim by 25%. This reduces the total sum claimed from £40,738.40 to £30,553.80, which we consider is a reasonable amount given the complexity of the claims and the sums in dispute. This includes any fee that may be payable to the managing agents in respect of their claims.

31. Accordingly, we find that the costs payable by the respondent are assessed at £30,553.80, such sum to be paid by 10 March 2022.

Judge Dutton 18 January 2022

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.

2. The date that the judgment is sent to the parties is the hand-down date.

3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.

7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

In this case, both the above routes should be followed.

General Form of Judgment or Order

In the County Court at Central London sitting at 10 Alfred Place, London WC1E 7LR	
Claim Number	**G84YX791**
Date	18 January 2022

Intercontinental Developments Limited	**Claimant Ref**
Antonio Maria Franzi	**Defendant Ref**

BEFORE Tribunal Judge Dutton, sitting as a Judge of the County Court (District Judge), with Mrs A Flynn MA MRICS as assessor

UPON the claim having been transferred to the First-tier Tribunal for administration on 24 November 2020 by order of Deputy District Judge Redpath Stevens sitting at the County Court at Central London

AND UPON hearing Mr Joel Semakula for the Claimant the Defendant not attending

AND UPON this order putting into effect the decisions of the First-tier Tribunal made on 18 January 2022

IT IS ORDERED THAT:

1. The Defendant shall pay to the Claimant by 10 March 2022 the sum of £30,553.80 being the sum found due and payable in respect of costs.
2. The Defendant shall pay to the Claimant by 10 March 2022 the sum of £400 being the sum found payable in respect of interest.
3. The reasons for the making of this Order are set out in the combined decision of the court and the First-tier Tribunal (Property Chamber) dated 18 January 2022 under case reference LON/00BK/LSC/2020/0375 and LON/00BK/LSC/2021/0023.

Dated: 18 January 2022